No. 11799

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED PACIFIC INSURANCE COMPANY, a corporation,
Appellant,

vs.

THE OHIO CASUALTY INSURANCE COMPANY, a corporation; R. H. McKEON, individually; GEORGE B. PAGE, individually; R. H. McKEON and G. B. PAGE, doing business under the fictitious name of Pacific Laundry and Dry Cleaners; GEORGE B. PAGE, individually and doing business under the fictitious name of Mission Linen and Towel Supply Company; FLOYD GILBERT, ROBERT ECHOLS and BEVERLY ECHOLS,
Appellees.

BRIEF OF APPELLEE THE OHIO CASUALTY INSURANCE CO.

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The Ohio Casualty Insurance Company, a corporation; R. H. McKeon, individually; George B. Page, individually; R. H. McKeon and G. B. Page, doing business under the fictitious name of Pacific Laundry and Dry Cleaners; George B. Page, individually and doing business under the fictitious name of Mission Linen and Towel Supply Company; Floyd Gilbert, Robert Echols and Beverly Echols,
Appellees.

BRIEF OF APPELLEE THE OHIO CASUALTY INSURANCE CO.

Statement of Facts and Issues.

The parties are referred to herein as United and Ohio. While all of the facts are stated below and supported by references to the record, we take the liberty of preceding the statement with a brief summary which highlights the issues.

A negligent tort feasor by the name of Floyd Gilbert caused a traffic accident. At the time he was driving a vehicle owned by A (insured with United), and was acting as an agent of A and B (insured with Ohio). Liabili-

ty was thus incurred by A as the owner of the vehicle and by A and B as employers of the driver. The liability of each has been fully discharged by their respective insurers, the parties to this appeal. As a result A, and A and B, have causes of action against Gilbert to recoup their respective losses. It is admitted that United insures Gilbert. Ohio, having discharged the liability of A and B, is entitled to recoupment, by way of subrogation to the rights of its assureds A and B, against Gilbert, unless it also insures Gilbert. This is the only issue on this appeal—does Ohio insure Gilbert?

As appears below, the issues raised by United in its brief do not exist at all in this case, with the single exception of the question whether Ohio insures Gilbert.

There is no issue whether or not the trial court followed the law of California as required by *Erie Railroad Company v. Tompkins,* 304 U. S. 64, relied on by United, because the trial court in every instance clearly followed and applied the law as established by the Supreme Court of this state. (Argument VIII, post.) So far as it has been possible to discover no jurisdiction has adopted any different rule.

There is no issue of contribution between tort feasors. (Argument III, post.) Ohio's right, protected by the present judgment, is to recoup from the insurer of the tort feasor in accordance with the universal rule that an employer may recoup from an employee whose negligence has caused him to incur a liability.

There is no issue of double insurance, as no double insurance existed here. (Argument IV, post.)

There is no issue as to whether the trial court failed to give precedence to the provisions of a rider attached to

an insurance policy because the rider relied on by United was obviously inapplicable, was found by the Court so to be, and is only partially quoted by United to make its point. The rider which was applicable was given effect by the judgment of the trial court. (Argument VI, I, post.)

All of the facts of this case were established by stipulation [Tr. 34-54] and are as follows:

One George B. Page, also known as G. B. Page, was at all material times engaged in various enterprises in various parts of California, in some as an individual and in others in partnership [Stipulation par. 5, Tr. 37].

Some of his activities were conducted in partnership with one R. H. McKeon [Stipulation par. 5, Tr. 37]. As to these activities Page, together with McKeon, applied for insurance with Ohio and received it [Stipulation par. 4, Tr. 36].

To cover his activities as an *individual* and in other activities expressly excluded from Ohio's coverage (as appears below) Page sought and obtained insurance from United. United's policy expressly insured Page as an individual and in other specified connections as appears below [Stipulation par. 3 (a), Tr. 35].

The foregoing coverages are unmistakably expressed in the two policies. Thus Ohio's policy provided that the named assureds are:

> "R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners, 110 State Street, Santa Barbara, California;
>
> "R. H. McKeon and G. B. Page dba Fashion Cleaners, 1041 Sierra Highway, Lancaster, California;

"R. H. McKeon and G. B. Page dba Mission Laundry & Cleaners, 222-224 N. Monterey Street, Gilroy, California." [Stipulation par. 4 (a), Tr. 36.]

The Ohio policy further provided by endorsement or rider, in typewriting, as follows:

"It is agreed that the coverage provided under the policy to which this endorsement is attached shall not apply to the liability of G. B. Page, a partner for his personal non-business exposures or activities; or his liability in connection with other business activities as an individual, a member of other partnerships a receiver, a director, or an executive officer of a corporation." [Stipulation par. 4 (b), Tr. 36.]

On the other hand United's policy named as assureds the following (emphasis added):

"George B. Page *individually* and dba Mission Linen and Towel Supply Company,

"H. B. Page individually and dba Model Linen Supply Co.,

"George B. Page dba Modern Linen Supply Company." [Stipulation par. 3 (a), Tr. 35.]

United's policy contained no endorsement rider or other provision modifying the foregoing.

It will be noted that between the two companies, Page applied for and received full coverage. With Ohio for certain specified *partnership* risks (together with McKeon), *expressly excluding all others,* and with United as an *unqualified individual* and in two other specified enterprises which he conducted individually under fictitious names. Thus *McKeon and Page* insured with Ohio and *Page,* alone, insured with United. This was not a matter of chance accomplished by stereotyped printed terms of

the policies, but of obvious intention, and the intention of the parties was further clarified by the endorsement or rider attached to the Ohio policy [Stipulation par. 4 (b), Tr. 36].

As appears below (Argument I, post) the parties had a right to make a binding contract differentiating the individual and partnership capacities of the insured *for insurance purposes.* (*National Automobile Insurance Company v. I. A. C.*, 11 Cal. (2d) 689; *National Automobile Insurance Company v. I. A. C.*, 11 Cal. (2d) 694.)

This case presents no controversy between an insurer and an insured, nor between an insurer and a claimant. The rights of the insureds have been fully protected exactly as contemplated in their policies and the demands of the claimants have been fully satisfied. Neither insurer denied its obligation to its named assureds. The only relevant question raised by United is whether Ohio as well as United, which admittedly does so, insures another party, Gilbert, as an additional assured.

The claim arose from an automobile accident occurring on January 16, 1946, in which parties by the name of Echols were injured. It is stipulated that the accident was caused by negligence on the part of one Floyd Gilbert, a truck driver [Stipulation par. 2 (a) and (c), Tr. 34-35]. At the time of the accident Gilbert was acting as an employee of R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners (assureds of Ohio) and was driving a truck owned by George B. Page dba Mission Linen and Towel Supply Company (assureds of United), and with the owner's permission [Stipulation par. 2 (a), Tr. 34-35]. Under these circumstances both the employer and the owner were liable and there is no

such thing as primary or secondary liability as between themselves. (*Consolidated Shippers, Inc. v. Pacific Employers Insurance Co.,* 45 Cal. App. (2d) 288, 114 P. (2d) 34; Argument V, post.) Thus both principals and both insurers were liable to the Echols. This was conceded by the parties [Tr. 147] and found by the Court [Conclusions of Law I, II, Tr. 64]. Accordingly, each company has contributed equally to the satisfaction of the Echols' claim [Tr. 208, Appellant's Brief 8].

As noted above, the only issue is whether Ohio, as well as United, insures Gilbert. Since Gilbert is not named in either policy it follows that to be insured he must be "an additional assured" as defined therein. There is no question that he is insured by United's policy as a person "using an owned or hired automobile . . . with the permission of the named insured" therein, George B. Page dba Mission Linen and Towel Supply Company. *Accordingly it was stipulated that United does insure Gilbert* [Stipulation par. 7 (a), Tr. 38].

"Additional assureds" within Ohio's policy are, *inter alios:* ". . . with respect to automobiles *owned by or registered in the name of the named assured* . . . any person or organization legally responsible for the use thereof provided the actual use is with the permission of the named assured" [Stipulation par. 6 (b), Tr. 37]. (It will be noted that this clause does not include hired automobiles.) It was stipulated that McKeon and Page dba Pacific Laundry & Dry Cleaners (Ohio assureds) and George B. Page dba Mission Linen and Towel Sup-

ply Company (United's assured) were not the same enterprises but were operated separately, although G. B. Page and George B. Page are the same person [Stipulation par. 5, Tr. 37]. As noted above, hereinafter (Argument I) the Supreme Court of California recognizes the right of parties to insurance contracts to recognize a partnership entity *for insurance purposes* so that certain activities of an assured may be covered while others are excluded (*National Automobile Insurance Company v. I. A. C., supra*).

The Court found that Gilbert was not operating a vehicle "owned by or registered in the name of any named assured or person insured in or by the said policy of the Ohio" and that he was not insured thereunder [Finding XV, Tr. 60].

This Finding is supported and dictated by the fact that the "named assured" in Ohio's policy are McKeon and Page, doing business in three specified enterprises, and by the endorsement or rider *which excludes all others.* Gilbert, driving a vehicle owned by George B. Page dba Mission Linen and Towel Supply Company, was driving a vehicle owned by Page in an expressly excluded capacity and not as a named assured. The vehicle was owned by Page in a capacity squarely within Ohio's exclusion [Stipulation par. 4 (b), Tr. 36].

It was stipulated at the trial that the Court should determine the rights and obligations of the parties with respect to Gilbert in order to avoid multiplicity of suits and circuity of action [Tr. 146-149]. After a discussion as

to whether this question, ultimate liability through the active tort feasor Gilbert should be decided, and after a recess to permit counsel for United to consider the matter, he stated: "We have no objection, your Honor, to the court deciding on the questions that the court feels should be decided in this case. We brought the action and we do not wish to narrow the issues. My point was perhaps more of argument than a statement of a desire for the issues to be narrowed." [Tr. 149.] Thereupon the Court proceeded to determine this, the only question in the case. United's prayer in its complaint for declaratory relief was for such relief, general and special, as the Court might determine proper [Tr. 10]. Accordingly, and from the Findings of Fact, the Court concluded and decreed that United should reimburse Ohio for all expenditures reasonably and necessarily made by it in compromising the claims of the Echols.

It is conceded that the claims of the Echols have been settled for $10,250, of which Ohio paid $5,125 and United a like amount [Tr. 208; Appellant's Brief 8].

United now seeks to read into the judgment a declaration that it should reimburse Ohio "as soon as Ohio reduces its purported claim against Gilbert to judgment" (Appellant's Brief 39-40).

The judgment contains no such qualification and United's present contention would repudiate the stipulation of the issues and restore the multiplicity of suit and circuity of action it was intended to avoid. Evidently United hopes successfully to defend Gilbert despite its

stipulation that his negligence caused the loss and its own decision that the settlement was reasonable and necessary, and thus avoid the consequences of the declaratory relief action which it instituted. At page 40 of its brief, United calls attention to a fact outside the record, that Ohio has served Gilbert with process in Nebraska. This was done as a precautionary measure only. Should this Court reverse the judgment herein, procedure against Gilbert directly might become necessary. As appears below, it is not necessary under these circumstances that a judgment first be obtained against Gilbert before his insurer may be liable, even in the absence of a declaratory relief decree. (*L. J. Dowell, Inc. v. United Pacific Casualty Co.,* 191 Wash. 662, 72 P. (2d) 296, pp. 306-7, pars.16-18.)

Having stipulated that its assured caused the loss through his negligence and having asked for a declaration of its rights and liabilities with respect to him, it would be a useless waste of time and money to prosecute another action in a distant state in order to afford United an opportunity to disprove what it admits to be the facts. Its stipulation of all of the essential facts and the declaration of its obligations by a court from which it sought such a declaration is certainly the equivalent of a judgment against the assured.

ARGUMENT.

I.

United Cannot Rely Upon the Lack of Partnership Entity in the General Law Because Contracting Parties May, for Insurance Purposes, Recognize a Partnership Entity and They Did So Here.

United's position may fairly be summarized as follows: (1) There is no partnership entity under the general law of California; therefore (2) Page is Page wherever found; and therefore (3) a vehicle owned by and registered to George B. Page dba Mission Linen and Towel Supply Company (United's assured) is a vehicle owned by and registered to Page as a partner in R. H. McKeon and G. B. Page dba Pacific Laundry & Dry Cleaners (Ohio's assureds), notwithstanding the restrictive terms of the coverage ordered and supplied, so that (4) at the time of the accident Gilbert was an additional assured of Ohio as a person using an automobile "owned by or registered in the name of the named assured" in the Ohio policy. In other words, relying upon the general law of partnership, and disregarding the special rule existing where the facts are as here, United contends that the restrictive language of Ohio's policy and endorsement should be disregarded and treated as if it did not exist.

In support of its position United relies upon *Park v. Union Manufacturing Company,* 45 Cal. App. (2d) 401, 114 P. (2d) 373, holding that there is no partnership entity in California. (United might with equal effect rely upon *Reed v. Industrial Accident Commission,* 10 Cal. (2d) 191, a decision of the California Supreme Court to exactly the same effect. However, United does not cite that case because it is expressly cited and distinguished

by the California Supreme Court *on the present facts* in *National Automobile Insurance Company v. I. A. C.,* 11 Cal. (2d) 689, at page 691.)

It is only necessary to refer to the facts of *Park v. Union Manufacturing Company, supra,* to perceive that the *National Automobile* cases and not the *Park* case control in the present situation. In the *Park* case, an employee who suffered an industrial injury collected workmen's compensation from the insurance carrier of one of the constituent partners. Claiming that the partnership was an entity separate and apart from its constituent partners, the plaintiff sought to maintain an action at law against the partnership to recover common law damages for the injury sustained. It was held that a partnership does not have a separate entity in California.

The *Park* case has no application to the present facts and United's argument disregards the established law of California that *for insurance purposes* the parties to a contract of insurance may recognize a partnership entity and thus segregate one risk from another on that basis. It is decided that parties may contract exactly as *McKeon and Page* did with Ohio in the present case. In *National Automobile Insurance Company v. Industrial Accident Commission,* 11 Cal. (2d) 689, a policy of insurance (workmen's compensation) was issued to L. H. Sherbert, an individual doing business as Dixie Club Restaurant. A printed portion of the policy provided "If this policy is issued to an individual, it shall cover only his liability as an individual employer and not any liability as a member of a co-partnership or any other organization." After the issuance of the policy and before the loss occurred the assured obtained a partner but continued doing the same business in the same place and under the same name. Al-

though the Court recognized that the risk to the insurer was not increased, it was held that this circumstance was "of no moment" (p. 691). It was held that the policy did not cover the loss and the Court distinguished those decisions which reach a different conclusion on the partnership non-entity theory where the policies do not contain such express language making the distinction. Ohio's policy contains, by *typed* endorsement or rider, the most specific distinction. It will be noted that in the foregoing case there was no such endorsement; merely the printed form of the policy contained the distinction. Furthermore, there was no change in the risk, and admittedly none. In the case at bar, Page had many activities which were expressly excluded by Ohio and sufficient thereof to seek separate insurance from United to cover the same and to pay a separate premium. He had other businesses in other parts of the state. However, if for the purpose of argument it is to be assumed that the case at bar presents through Ohio's endorsement no change whatever in the risk, it is the law of California as represented by the case cited that "The fact that the assured's liability to employees of the co-partnership was no greater than that which would have attached to him had he retained the status of 'individual employer' contemplated by the policy, is of no moment in (our) determination of the coverage thereunder" (p. 691, par. 2).

In the second case cited, *National Automobile Insurance Company v. I. A. C.,* 11 Cal. (2d) 694, the same rule is strictly applied. There the policy (also one of workmen's compensation) was issued to a co-partnership and expressly provided that it covered the partners "jointly and not severally." The partnership was engaged in the taxi business. The taxi causing the injury was owned and

operated by one of the named partners and another partner not named in the policy. It was held that the loss was not covered. The Court said, among other things pertinent to the present case:

> "The fact that from time to time changes in membership of the partnership entity intended to be covered were reflected in the policy, tends strongly to indicate that it was the intention of the parties that the coverage extended only to the entity made up of the parties so designated. The right of an insurer to limit its contract of coverage may not be questioned." (Pp. 697-8.)

Each of the foregoing cases is pointed authority for the position of Ohio herein and directly repudiates United's argument. The only attempt by United to distinguish these cases is found in this brief statement at page 25 of its brief: "In the *National Automobile* case the insuring clause clearly stated the particular business enterprise to be covered." Not even a straw is grasped for here. Ohio's policy pointedly states the particular business enterprises insured and removes all argument by a specific endorsement excluding all others.

So far as we are aware no other rule prevails in any jurisdiction and it seems improbable that any other conclusion could have been reached. United cites no authority to the contrary. It will be noted that although in the second of the *National Automobile* cases the Court says (p. 698): "The right of an insurer to limit its contract of coverage may not be questioned," Ohio did not seek a limitation of its coverage in this case. The insurance was applied for by the assureds *McKeon and Page* as they wanted it and it was issued as ordered. *Page* applied to United for insurance covering risks not insured by

Ohio. (As a matter of fact Page had already obtained his insurance from United before the Ohio policy was issued. The United policy was effective September 18, 1944 [Tr. 11] and Ohio's policy became effective March 24, 1945 [Tr. 20]. From this it may be inferred that McKeon and Page entered partnership after the inception of United's policies and knew that additional insurance was necessary.) There is no reason to assume that Ohio would not have accepted all risks *and collected a premium therefore* had such coverage been desired of it. If the pointed language of Ohio's policy does not effect the clear intention of the parties, a lawful one in California, it is difficult to imagine a formula which would do so.

II.

If the Law Were Otherwise Absurd Consequences Would Follow.

If the law were not as declared in the *National Automobile* cases the most anomalous result would follow and an arbitrary, irrational impairment of the right of contract would result.

(1) Since, according to United's argument a partnership entity cannot be recognized *for any purpose*, no person could apply for insurance and no insurer could issue a policy, without including in the coverage every activity of the insured however extensive and diversified and however limited the premium. Every partnership policy would extend to the constituent partners individually and as members of other partnerships and every individual policy would apply to partnership activities regardless of painstaking efforts on the part of all parties to avoid such results and in spite of premium calculation on another basis. Insurers would find themselves exposed to express-

ly rejected risks for which no premium was collected and assureds provided with gratuitous coverage which they did not wish to purchase. The present case provides a sufficient illustration of the foolish result for which United argues. G. B. Page knew that he was engaged in various, scattered business enterprises and that he was exposed to certain risks as an individual which he did not share with his partner McKeon. He and McKeon applied to Ohio for coverage of their activities as partners, paid Ohio a calculated premium on that risk, informed Ohio of his other activities, had them excluded, insured them with United, and received from Ohio what he ordered. Yet according to United's argument he was fully insured by Ohio; the premium paid United was unnecessary and the express exclusions of Ohio's policy became part of its coverage. According to that argument the law thrusts this coverage upon Ohio gratuitously upon the theory that the parties were helpless even by the plainest contract to differentiate Page as a partner in three specified enterprises from Page as an individual. The facts of this case prove the fallacy of any argument that it makes no difference whether the driver is an additional assured in all instances, or not.

(2) There is another respect in which United's argument, if it received the sanction of law, would accomplish a preposterous result and it is earnestly requested that the Court carefully consider it. If a vehicle owned by Page *in an expressly excluded capacity* (as here) is owned by a named assured in Ohio's policy (McKeon and Page dba etc. *and no others*) then every person driving a vehicle owned by Page in any capacity, including those insured by United, would be an additional assured of Ohio. *In other words, Ohio would insure every driver,*

the direct tort feasor, of any of Page's vehicles in all of his excluded activities and would thus insure directly the very risks which it expressly excluded. Ohio would then have thrust upon it by operation of law, liability for the very losses which were expressly excluded. The agreed lawful limitations of Ohio's policy would be totally vitiated. It is obvious that a vehicle owned by George B. Page dba Mission Linen and Towel Supply Company is not a vehicle owned by McKeon and Page dba Pacific Laundry & Dry Cleaners, or by Page as a member of that firm, *when all other activities of Page are excluded.* Instead the car was owned squarely within the exclusion of Ohio's policy, *"in connection with other business activities as an individual."* This quoted language is taken from the endorsement of Ohio's policy [Stipulation par. 4 (b), Tr. 36]. It is difficult to imagine a clearer case.

(3) *A further absurd consequence of the same variety would be that even Page, himself, would be insured by Ohio in his excluded capacities.* If he is to be regarded as "Page" wherever found, then his private automobiles, covered by United when it undertook to insure "George B. Page, individually" [Tr. 44] are insured with Ohio since Page in McKeon and Page, so the argument goes, is Page unrestrictedly. *Thus again Ohio's exclusions would become part of its coverage.*

(4) United's argument if sound would recoil upon itself, for if Page is Page wherever found, Ohio's coverage becomes United's coverage and United becomes the target of every argument it has directed at Ohio.

The validity of the present contracts of insurance, both with United and Ohio, is established in the law of California and attention is not directed to any contrary authority if there could be any in any jurisdiction. It is respectfully submitted that the trial court reached the only possible conclusion and that the judgment should be affirmed.

III.

No Question of Contribution Between Joint Tort Feasors Exists in This Case.

None of the other issues raised by appellant exist in this case although they are solemnly asserted with a most confusing effect. United contends that the judgment in this case results in a contribution between joint tort feasors. Decisions are cited (*Adams v. White Bus Line,* 184 Cal. 710, 196 Pac. 389; *Smith v. Fall River, etc. District,* 1 Cal. (2d) 331, 34 P. (2d) 994; *American Surety Co. v. Bank of Calif.,* 133 F. (2d) 160, and *Universal Indemnity Insurance Co. v. Caltagirone,* 119 N. J. Eq. 491, 182 Atl. 862) holding that there is no contribution between joint tort feasors and that the insurer of one tort feasor cannot subrogate against another. *Schilling v. Central California Insurance Co.* is also cited (p. 30) but the citation is that of *Consolidated Shippers, Inc. v. Pacific Employers Insurance Co.,* which is the only one of the two discussed and it is assumed that reference is intended to the latter case.

These cases state platitudes so far as this case is concerned. Naturally no right of contribution between joint tort feasors is claimed, nor any right of the insurer of one to subrogate against another. Proceeding upon the false premise that Ohio, proceeding through McKeon and Page, seeks to recoup from *Page* instead of from *Gilbert,* United attempts to invoke the rule against contribution between tort feasors.

It is perfectly obvious that Ohio is not seeking to subbrogate against *Page.* Nowhere in the judgment will be found any reference to a right to subrogate against Page. The right of subrogation is asserted against *Gilbert* and we believe it is safe to say that no decision can be found holding that an employer may not recover from his negligent employee recoupment of losses imposed upon him by the employee's negligence. In actions *inter se* the negligence of the employee is not imputed to the master.

The right of McKeon and Page (and of Page also) to recover from Gilbert sums necessarily expended in payment of Gilbert's torts is unquestionable, and no contribution between joint tort feasors is remotely suggested by such procedure.

As stated in *Johnson v. City of San Fernando,* 35 Cal. App. (2d) 244, at page 246:

> "An employer against whom a judgment has been rendered for damages occasioned by the unauthorized negligent act of an employee may recoup his losses in an action against the negligent employee."

To the same effect is *Myers v. Tranquility Irr. Dist.,* 26 Cal. App. (2d) 385, at page 389.

(The same rule would apply where a reasonable and necessary settlement is made although the employer making such a settlement could not rely in such instance upon a judgment to prove that it was reasonable and necessary. (*L. J. Dowell, Inc. v. United Pacific Casualty Co.,* 191 Wash. 666, 72 P. (2d) 296, pp. 306-7, pars. 16-18. In the case at bar all essential facts have been stipulated by the party called upon to make recoupment and a judgment against Gilbert could establish nothing more and would be an idle act.)

If Gilbert had a separate insurance policy with a different insurer we wonder if United could possibly make the argument it now presents to this Court? Instead of making such an argument United itself would be doing exactly what it now contends Ohio may not do, proceeding against Gilbert and his insurer to recover its own expenditure. United admits that it insures Gilbert and therefore, unless Ohio also insures him, and we submit that it does not, Ohio is entitled to pursue its remedy, as subrogatee of Page and McKeon. The only impediment to similar action by United as subrogatee of Page is that United insures Gilbert and it cannot subrogate against itself.

We respectfully submit that decisions denying contribution between joint tort feasors or their insurers have no remote bearing upon the present question. The trial court recognized Ohio's right of recoupment from Gilbert and not from Page.

IV.

There Was No Double Insurance and the Court Apportioned the Loss in the Only Possible Manner.

We are not sure that the exact meaning of United's argument in its section 3 (pp. 31 to 38) is understood and therefore a brief reply is made to every possible import of that argument.

United states (p. 31): "United has appealed for the reason that the decision of the court below places the entire responsibility upon it." *This occurred solely because United insured Gilbert and not by reason of its insurance of Page.* The liability between Ohio for *Page and McKeon* and United for *Page* was divided equally and, as appears below, no other division could be justified. If some other insurer, a stranger to this record, had insured Gilbert as did United, it would be obvious to all observers that it carried the ultimate tort liability and the fallacy upon which United proceeds would be unthought of. United is manifestly confused because of its dual capacity. It is the insurer both of Page and of Gilbert. In its capacity as insurer of Page it complains of its liabilities as insurer for Gilbert, a *non sequitur* which would be avoided if a third insurer occupied the position of Gilbert's carrier.

There was no double insurance in this case. Double insurance is defined in Section 590 of the Insurance Code of California, quoted by United at page 31, as existing "where the *same person* is insured by several insurers." If either Page or McKeon and Page, were insured in the same company, there would be double insurance but such a situation can arise only if this Court rejects the California law and holds that Page, as an individual, was

insured by Ohio despite the exclusion. This assumption would beg the question presented in the first portion of this argument.

Where separate defendants are insured in different companies there is no double insurance. If, as joint tort feasors, they were to go into court and ask for a declaration of rights as to the proportion of their liabilities they would be met by the rule mistakenly relied upon by United here that there is no contribution between joint tort feasors. A court could not declare what proportion of the loss, *for which each was wholly liable,* each should pay. As between themselves, and toward the claimants there was no *primary* and *secondary* liability here. (Argument V, post.) In this case United has asked a court to declare its rights as an insurer respecting another insurer. The Court could have declared that since each defendant in the tort case was liable for the whole loss *(subject to the ultimate liability of Gilbert)* it could not apportion the loss between them. Instead the trial court equitably ruled that each company should discharge its obligation to its assureds and that as between Page on the one hand and McKeon and Page on the other, the loss should be discharged equally [Conclusions III, IV; Tr. 65]. As discussed below no middle ground was possible and the two policies issued to separate assureds could not be prorated. *This, however, is a moot question.* The parties have already paid. If either had paid too much, as between themselves, there could not be any refund because there is no contribution between tort feasors or their insurers. The liability of each was vicarious and traced through Gilbert. If either company had not paid enough there is nothing more to be paid since the claim is wholly satisfied. Therefore in so far as any controversy, theo-

retical only, could arise between Page and McKeon and Page, they must be left where they are, the only issue being recovery from Gilbert who caused the loss. Each has that right but, since United insures him we do not find Page's insurer asserting its right. If the argument of United at this point is intended to suggest that the Court should have ordered the insurer of McKeon and Page to share with the insurer of Page the tort liability in proportion to their respective policy limits it must fail because it erroneously assumes that the "same person" was insured in each company. If A, having an insurance policy of $20,000 is jointly negligent with B having a policy limit of $10,000, it would be absurd to assume that the two companies should share the loss on a 2/1 ratio. Such a conclusion would effect the contribution between joint tort feasors which the law does not sanction and which United so strongly denies. (It would be squarely against the decision in *Universal v. Catagirone,* 182 Atl. 862, relied on by United.)

The cases cited by United, evidently for the purpose of supporting a contention that this is what the Court should have done (*Consolidated Shippers, Inc. v. Pacific Employers Insurance Co.,* 45 Cal. App. (2d) 288, and *Lamb v. Belt Casualty Co.,* 3 Cal. App. (2d) 624), are wholly beside the point for two reasons. (1) They did involve double insurance. In the *Consolidated Shippers* case, both companies issued policies to the same assured, one covering liability arising from the *ownership,* maintenance and use of a vehicle and the other covering liability arising from the operation of all automobiles *not owned* by it. In the *Lamb* case, one company issued a policy to Lamb insuring him from liability arising from the operation of a truck and another company issued a

policy insuring him for liability arising from the operation of a trailer. Negligent operation of the truck and trailer concurred to cause the loss.

In each case the same assured had a policy with two companies covering the same loss, thus resulting in double insurance. Such a result can be reached in this case only if this Court holds that the exclusions in the Ohio policy are meaningless and that Page in his individual capacity is insured as a partner in McKeon and Page despite the pointed declaration to the contrary.

(2) The two decisions are inapplicable for another reason, even if it were assumed that double insurance existed here. Each case involved policies with *pro rata* clauses. All four policies, the two in each case, provided that if the assured had other insurance covering the same risk he should not recover from the insurer a larger proportion of any loss than the coverage bore to the whole amount of applicable insurance. No such provisions existed in the present policies. Ohio's policy provided that if there was other insurance its coverage should be *excess* only [Tr. 49-50]. United's policy contained the same provision [Tr. 47]. If these clauses are effective the anomalous result would be to provide no insurance since neither would pay until the other had done so and each would decline because of the defection of the other. Clearly such clauses cancel each other. The cases relied on by United have no application here at all because, even if they involved the same assured, they contain radically different provisions and furthermore they do not involve the same assured, a fatal and absolute distinction.

If the trial court erred in declaring the rights and liabilities of the parties hereto with respect to Page and

Page and McKeon it erred on the side of equity and, each party having executed that part of the judgment, *the error is now moot* without right of refund. *The fact that United, as insurer of Gilbert, insures the person ultimately liable has nothing to do with the present controversy and has no place in its argument as insurer of Page.*

V.

There Is No Such Thing as Primary and Secondary Liability as Between Page and McKeon and Page.

If the argument of United discussed above (Section 3, p. 31, *et seq.*) is intended to indicate that the Court *did* find that a primary and secondary liability existed between Page on the one hand and McKeon and Page on the other, it is mistaken. Similarly, if the argument is intended to demonstrate that the Court should have found a primary and secondary liability, the primary being on the part of Ohio's assured McKeon and Page as employers, it is likewise mistaken.

There is no such thing as primary and secondary liability on the facts of this case (although in so far as Gilbert is concerned his liability is obviously ultimate when recoupment is sought.) The case of *Consolidated Shippers, Inc. v. Pacific Employers Insurance Co.*, 45 Cal. App. (2d) 288, squarely holds that no primary or secondary liability *to the victim* of the tort exists. There two insurance companies insured respectively an employer and an employee (or principal and independent contractor) and the same argument was made, viz., that the primary tort liability belonged to the employee and therefore that the primary insurance coverage belonged to his insurer. It may be, although we are not certain, that United is

making the point that as between the two named assureds the primary tort liability rested with Ohio's assured, the operators of the truck, and that therefore the primary insurance coverage should follow accordingly, United's liability as insurer of the vehicle owner being secondary. In *Consolidated v. Pacific, supra,* the California Court rejected this argument, held to the contrary, and a petitiion for hearing in the Supreme Court was denied. The Court said:

> "Pacific contends that Harvey was primarily liable, that plaintiff was secondarily liable and that the judgment correctly determines the respective liabilities. No California case is cited in support of this proposition and *we know of no law in this state fixing degrees of liability in relation to the joint liability for torts.* From the fact that an action to recover damages for injuries resulting from the negligence of an employee may be maintained against either the employer or the employee alone (*Schilling v. Central California Traction Co.,* 115 Cal. App. 30, 1 Pac. 2d 53), or against both jointly, it would seem that there could be no such thing as primary and secondary liability. Moreover, the court made no finding on the issue of primary and secondary liability *as between Harvey and plaintiff,* and in fact made no finding concerning the relationship existing between Harvey and plaintiff out of which the latter's liability arose. In view of our conclusion that both policies insured the same risk so far as plaintiff is concerned, *the fact that plaintiff's liability may have been primary or secondary becomes immaterial.* Regardless of the nature of such liability, any loss resulting therefrom was covered by both insurers. Judgment reversed." (Emphasis added.)

As already noted the employer, having been rendered liable by his employee's negligence, may recoup from his employee (*Johnston v. City of San Fernando,* 35 Cal. App. (2d) 244, 246; *Myers v. Tranquility Irr. Dist.,* 26 Cal. App. (2d) 385, 389).

VI.

"The Rider" of Ohio's Policy Relied on by United Has No Application to the Present Case.

The argument of United that the "rider" it refers to extends Ohio's coverage is based upon an emasculated and very misleading quotation of its terms. United baldly asserts (Appellant's Brief pp. 12-13) that "by a Certificate of Insurance issued subsequent to the policy itself, Ohio stated that its coverage applied to all automobiles owned or *operated* by its assured." The emphasis is United's. Further, it says (p. 13): "The special endorsement controlled. The printed form of the original policy was relegated to the background." Based upon this highly misleading statement United argues that the trial court ignored the holding of this Court in *Tarleton v. De Venne,* 113 F. (2d) 290, and later argues (p. 38) that the trial court thus failed to follow the law of California that a rider to a policy takes precedence over printed provisions in its main body.

A mere reference to the Certificate of Insurance referred to, as United well knows and as the trial court found, shows that it was issued to *Camp Cooke Post Exchange* and that it was clearly intended to apply only to operations of a limited character performed by the assured on behalf of that Post Exchange. The endorsement was expressly "Issued to Camp Cooke Post Ex-

change." There is no evidence or suggestion that Gilbert was acting directly or indirectly in connection with any errand to or from Camp Cooke. The Court found that the said endorsement was "issued for the protection of the said Camp Cooke Post Exchange in connection with activities of the assureds conducted on behalf of Camp Cooke Post Exchange and that said endorsements did not otherwise affect or modify said policy and were not intended so to do" and further "that at the time of the accident in question the truck was not being operated on behalf of Camp Cooke Post Exchange." [Finding XXI, Tr. 63.]

The full text of the Camp Cooke endorsement appears at pages 50-51 of the Transcript.

United makes no reference to Camp Cooke Post Exchange, the addressee of the endorsement upon which it relies, nor to the finding of the Court respecting it.

It is obvious that the endorsement was issued to satisfy some requirement of Camp Cooke Post Exchange. The limited significance and application of this endorsement was recognized by United when the record was made in this case. A reference to the Stipulation of Facts [Tr. 34, *et seq.*] shows that no stipulation was made concerning this endorsement (although its issuance was admitted and it was part of Ohio's policy filed as an exhibit with its answer), because clearly United did not at that time intend to make such a contention. *In the statement of United's pre-trial contentions* [Tr. 40-41] *no such contention appears.* It is suggested as an apparently desperate afterthought.

There is no question that the rule of construction is as contended by United, that a rider attached to a policy takes precedence over the printed body thereof. So far

as this particular endorsement is concerned it was the function of the trial court to draw the proper conclusion as to the intention of the parties and its finding cannot be disturbed if there is room for reasonable difference of opinion. We submit that had a different conclusion been drawn it would have been contrary to the plain intention of the endorsement and unsupported by evidence.

The only place for application of this admitted rule of construction in this case is in connection with the endorsement to Ohio's policy found at page 36 of the Transcript providing that coverage is not extended to Page as an individual or in connection with any activities not specified in the policy. The rule of construction relied on by United provides a strong additional reason for rejecting its argument on the main point. United contends that since McKeon and Page are named as assureds, Page is an assured. But the endorsement says in so many words "When we say McKeon and Page we mean McKeon and Page in connection with the activities of McKeon and Page and we do not mean Page as an individual or in connection with any activities not specified herein." This endorsement, and the rule of construction elevating it to precedence over the policy itself, United asks this Court to ignore. However, the main body of the policy confirms the rider by specifically naming the assureds.

It is respectfully submitted that in attempting to defeat the deliberate and carefully expressed intention of both the insurer and the assured upon the basis of an endorsement specifically directed to a third party United is grasping at straws. The trial court was justified in finding as it did in connection with this endorsement and, we believe, compelled to do so.

VII.

Insurance Code, Section 383.5, Has No Application.

By an ingenious and highly sophisticated argument United contends (pp. 16-17) that since Section 383.5 of the Insurance Code of California provides that " 'the owner' as used in this section means any person who is named as an insured in such contract of insurance," Page, being named in McKeon and Page, is the owner of the vehicle in question. At the outset it should be observed that there is nothing in the section in question which would alter the situation even if we were to translate the name of every person mentioned in the policy into "owner." However, we believe the argument reduces itself to an absurdity for other reasons.

The statute has been Shephardized and no cases interpreting it have been found. The statute provides that a person *"who is named as an insured"* is to be regarded as an owner. It does not provide that persons who are excluded must be regarded as owners. Therefore, when a policy insures "Richard Roe and all members of his household except his son John Roe" (a frequent policy provision to exclude irresponsible drivers) it is obvious that John Roe, not being named as an insured, is not to be considered as an owner. By a parity of reasoning, when a policy names as assureds "McKeon and Page dba Pacific Laundry & Dry Cleaners, *but not Page in any other capacity*," it is very clear that "Page in any other capacity" is not named in the policy as an assured, but is named as a person who is excluded.

Again, in order to accept United's argument it will be necessary for this Court to disregard the decisions in the

National Automobile cases and to delete from the contract between Ohio and McKeon and Page the very clear and lawful exclusions it contains.

VIII.

The Court Followed the Rule of Erie Railroad Company v. Tompkins, 304 U. S. 64.

United asserts that in various respects the trial court failed to apply the law of California and that it thus disregarded the rule of *Erie Railroad Company v. Tompkins,* 304 U. S. 64.

"The most grievous error of the trial court" is alleged to have been "in disregarding the California rule which has been followed by this Court that a rider attached to a policy takes precedence over the language contained in the body of the contract." (P. 38.) On this basis United complains that the trial court interpreted Ohio's policy to mean what it says and to deny that it insured the risks which were excluded (pp. 38-39). On the contrary as has been seen the rider relied upon by United is so obviously inapplicable that it cannot be quoted in full in its brief without self-refutation. The rule of construction, however, does apply elsewhere in this case and was applied by the trial court in giving effect to the rider interpreting "McKeon and Page" and expressly excluding risks insured by United.

Next, in this connection, it is argued that the trial court "failed to follow the correct rule with regard to

partnerships in California" (p. 39). The fact is that the trial court squarely followed the law of California as established in the *National Automobile* cases. So far as we are aware the decision of the trial court is not in conflict with any decision in any jurisdiction.

Next, it is claimed that the trial court failed to give effect to Section 383.5 of the Insurance Code of California. As has been noted, to interpret that statute so as to treat one excluded from coverage as a "person who is named as an insured" would be an absurdity and in refusing to accept such an argument the trial court did the inevitable.

Lastly, it is contended that the trial court failed to follow the law of California respecting double insurance as laid down in *Consolidated Shippers v. Pacific Employers Insurance Co., supra,* and *Lamb v. Belt Casualty Co., supra.* As has been noted these cases have nothing to do with the present problem. They involved policies issued by different companies to the same assured, not policies issued to different assureds. Furthermore, this case involves no problem of prorating insurance but the question of who carries the insurance on the ultimately liable, single tort feasor.

It is conceded that the contracts are to be governed by the law of California as held by this Court in *Gates v. General Casualty Company of America,* 120 F. (2d) 925. It is respectfully submitted that the trial court on every point followed the law of this state which, so far as we are aware, represents the law universally.

Conclusion.

It is respectfully submitted that United's argument is based upon a confused misconception of the facts and of its own dual capacity herein. It appears in this Court in a dual capacity, as insurer of G. B. Page, an individual, and as insurer of Floyd Gilbert, *who caused the accident*, and who carries the ultimate liability to those who suffered loss through him. As insurer of Page United has no conceivable objection. If it is dissatisfied with having paid one-half the claim of the claimants as insurer for *Page* its objection is unfounded since its liability was total (as was that of McKeon and Page) and furthermore it has rendered the question moot by discharging one-half of the claim.

In its capacity as insurer of Gilbert, United also has no cause of complaint. It admits that it insured Gilbert and that Gilbert culpably caused the loss. Gilbert is therefore liable to Page and to McKeon and Page to reimburse their losses. If some other insurer than United insured Gilbert, United would undoubtedly press its right of subrogation as Ohio is now doing. But because of the confusion on the part of United as to its dual position, *it attempts to stand in the character of insurer of Page and complain of the liability imposed upon it as the insurer of Gilbert.*

There is no doubt that the insurer of an employer who has reasonably and necessarily discharged a liability created by the negligence of its employee has a right to recoup from the employee or his insurer (*Johnston v. City of San Fernando, supra; Myers v. Tranquility Irr. Dist., supra*).

The other arguments made by United, that the Court ignored the law of California in various respects and ordered contribution between joint tort feasors are bewilderingly foreign to the issues of this case.

Under these circumstances a judgment against Gilbert should not be and is not necessary as a condition precedent to the establishment of United's liability (*L. J. Dowell, Inc. v. United Pacific Casualty Co., supra*). United was the defendant in the foregoing decision. A judgment against Gilbert would establish only two things: Gilbert's liability and the extent of the liability. *United has stipulated to both elements.* It admits that Gilbert was to blame for the accident and it fixed a reasonable price by making a settlement. While United apparently claims the right to defend an action against Gilbert, thus having a chance to disprove the very things it has admitted, such procedure would, we respectfully submit, be unconscionable and would involve a waste of money and effort on the part of all concerned.

Beyond all this, United has invoked the aid of the District Court of the United States to declare its rights and obligations and expressly asked the Court to declare its obligations as to Gilbert. The trial court answered this prayer and decreed that United is obligated, within the limits of its policy, to reimburse Ohio for all expenditures, reasonably and necessarily made by it in satisfaction of the claim. This was the sum of $5125 (Appellant's Brief 8). It should not now be permitted to repudiate the judgment of the trial court and to require Ohio to prove in a Nebraska Court those things which United has admitted in the Court below.

It is respectfully submitted that the trial court has rendered the only possible judgment on the facts of this case and it is prayed that the judgment be affirmed.

Respectfully submitted,

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